IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b)

Description of Case

WP No. 269(M/B) of 2003, decided on 13.08.2003

Smt. Nandi Devi Fulara Vs Union of India & others

A.F.R. (Approved for Reporting)

~~Not approved for reporting~~

Initials of Judge

Date 13-08-2003

Note:- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

Court No.3
Reserved.

Writ Petition No. 269 (M/B) of 2003

1. Smt. Nandi Devi Fulara
2. Sri Praveen Tolia…….…… Petitioners.

Versus

Union of India and others…….…… Respondents.

Hon'ble Irshad Hussain, J.
Hon'ble M.M.Ghildiyal, J.

(Delivered by Hon'ble Irshad Hussain, J.)

The only question which arises for consideration in this writ petition is, whether the impugned conditions at para Nos. 7 and 8 of section- IV and para No.10 (II) of section VI of tender/bid document for hiring of light commercial vehicles on long term use in Nainital S.S.A. floated by Bharat Sanchar Nigam Limited (a Government of India Enterprises), suffers from hostile discrimination as these wholly denied the petitioners to carry lawful calling of their choice guaranteed under Article 19 of the Constitution of India and as such are un-constitutional.

Notice inviting tender was advertised by Bharat Sanchar Nigam Limited under orders of General Manager Telecom district Nainital headquarter Haldwani for hiring 17 light commercial diesel/C.N.G. vehicles for use by the department. Petitioners purchased bid document at a price of Rs. 540-00 per vehicle and submitted their bids. The qualifying bids were scheduled to be opened by T.O.C. on 2.4.2003 and financial bid of those whose qualifying bids have been accepted were scheduled to be opened on 7.4.2003 at stipulated hours. The petitioner No.1 in her bid document gave required information that her husband Sri L.D. Fulara is working as senior T.O.A. (Gen) in B.S.N.L. in the office of General Manager Telecom district Nainital, headquarter Haldwani and whereas the petitioner No.2 divulged information that his father Sri H.R.S. Toia and mother Smt. Basanti Tolia are working as senior T.O.A. in the said establishment. The relevant paras 7 and 8 of section IV of bid document laid down conditions which forbid the relatives of the employees working in B.S.N.L. from making a bid for the said work and these conditions are as below:

> Para No. 7: No sub contracting is permissible by BSNL. The near relatives of all B.S.N.L. employees Non-executive employees

working in BSNL Nainital (name of unit) & executive employees also called Group-A & Group –B officers working in BSNL, Nainital (name of unit) either directly recruited or on deputation are prohibited from participation in this tender. The near relatives for this purpose are defined as:

(a) Members of a Hindu Undivided Family,

(b) They are husband and wife,

(c) The one is related to the manner as father, mother son(s), son's wife (daughter-in-law), daughter(s) & daughter's husband (son-in-law), brother(s) & brother's wife, sister's, sister's husband (brother-in-law).

Para No.8:The tenders should give a certificate to the effect that none of his/her such relative is working in this units of BSNL as defined above. In case of proprietorship firm the certificate will be given by all the partners and in case of limited company by all Directors of the Company. Any breach of these conditions by the company or firm or any other person, the tender/work will e cancelled and earnest money/security deposit will be forfeited at any stage whenever it is noticed. The BSNL will not pay any damages to the company or firm or concerned person. The company or firm or the person will also be debarred for further participation in the concerned unit.

Further Para No. 10 (II) of section VI of the bid document lay stress on the requirement that no vehicle should be supplied having registration in the name of employee of BSNL staff or close relatives and certificate to this effect be given on the body of bill while submitting the claim.

The financial bids of the petitioners were not opened by the respondents and aggrieved the petitioners filed the instant writ petition for a prayer to issue writ or directions in the nature of certiorari for quashing the tender forms, Annexure A-2 and 2-A as they contained the above mentioned conditions which are totally unconstitutional and creation of some malafide intention of the authorities concerned and other ancillary reliefs.

Before filing the writ petition the petitioners have made representations Annexures 6 and 6-A to the respondent No.4 and while the time to file counter affidavit was given on 16.4.2003, the

respondents were also directed to meanwhile decide the representations by speaking order.

The respondents filed the order passed thereon the representations, Annexure A-1 to the counter affidavit wherein it had been mentioned that since petitioners are the relatives of BSNL employees of Nainital SSA (unit) as such in pursuance of para 7 and 8 of section IV of the bid document, their financial bids were not opened and not considered. The respondents also submitted that the petitioners were debarred from participating in the bid in question, as their near relatives are employees of BSNL and there are apparent apprehensions of illegal gain from the near related employee of the bidders and therefore it was incumbent upon the management of the BSNL to frame such conditions which would minimize undue burden on the public exchequer and public money. Therefore classification framed by the department is quite reasonable and in public interest, which is permissible and protected under the constitution of India.

Heard Sri P.S. Adhikari learned counsel for the petitioners and Sri G.S. Bisht learned Senior Standing Counsel Government of India for the respondents.

Learned counsel for the petitioners submitted that the conditions at para 7 and 8 of section IV annexed with tender(bid document) are absolutely arbitrary, unreasonable and irrational and these violate the provisions as contained in part III of the Constitution of India and guarantee as given under Article 14, 16 and 19 of the same and therefore the impugned tender/bid document issued by respondent Nos. 4 and 5 deserve to be quashed and the petitioners be granted further ancillary reliefs claimed in the writ petition. The gist of contentions of the learned counsel for the respondents was that the restriction imposed was to maintain purity in public life and therefore legally permissible, just and reasonable.

At the out set it is to be mentioned that it is trite law that Article 14 of the Constitution applies also to matters of Governmental policy and if the policy or any action of the Govt. even in contractual matter fails to satisfy the test of reasonableness, it would be unconstitutional. it is also now well settled as a result of the decision of the Apex Court in *E.P. Royappa versus State of Tamil Nadu; AIR 1974 S.C. 555 (583-584)* and *Meneka Gandhi versus Union of India 1978 (2) S.C.R. 621*

(676) that Article 14 strikes at arbitrariness in state action and ensures fairness and equality of treatment. It is required that every state action whether it be under authority of law, or in exercise of executive power, without making of law, the principle of reasonableness and rationality should be followed in letter and spirit. The state cannot therefore act arbitrarily in entering into the relationship, contractual or otherwise with a third party, but its action must stood a test of rationality and reasonableness.

Under clause (1) (g) of Article 19 of the Constitution of India, every citizen has a freedom and right to choose his own employment or take up any trade or business subject only to the limits as may be imposed by the State in the interest of public welfare and the other grounds mentioned in clause (6) of Article 19 of the Constitution of India. Restrictions can be imposed by subordinate legislation or executive order. The state or its instrumentality can carry on executive function by making a law or without making a law.

The answer, to the question under consideration in this petition, need to be given keeping in view the above settled principle of law and the respective submissions made on behalf of the parties by their learned counsel. The restrictions imposed on a group of individuals whose relatives are the employees of the BSNL have been reproduced above and which form part of the bid document. In paragraph-4 of the counter affidavit it is averred that earlier also the relatives of the employees of the telecom department were not qualified to participate in the bid for hiring their vehicles. There is, however, no document on record as may support the claim made regarding the earlier practice. Even otherwise from the strand point of the interest of general public or the purity in public life it does not appear as to how the general category of employees of the BSNL would be able to distribute favour and patronage to their relatives who have offered bids for the job or work and even to those who have been awarded the work on acceptance of their bids. The reasonableness of the restrictions has to be determined with reference to the circumstances relating to the work in question.

Notice inviting tender Annexure-1, reveal that estimated cost of the work is approximately Rs. 1.5 lacs per vehicle which in the

present commercial proposition can not be termed as work of high value. The bid document Annexure-2 comprehensively cover every aspect of the work in great deal and the bidder is to offer the charges for every kilometer of run of the vehicle to be ascertained by meter reading. The minute details of structured, qualifying as well as financial, bid itself, in fact, eliminate any chance or opportunity of manoeuvring and extending favour to any of the bidder. After acceptance of the bid the charges are required to be calculated on the basis of meter reading and the accuracy of the meters has even been ensured by the condition of para-8 of section VI of the bid document.

As regards the interest of the general public or purity in public life is concerned, it need to be appreciated that almost every service conduct rules applicable to different category of the employees take care that government servants or employees of any of the instrumentality of the State shall not, in the discharge of their official duties, deal with any matter or give or sanction any contract to any member of their family or even company or firm in which any member of their family has financial interest or is employed. To illustrate Rule 4(3) of C.C.S. (Conduct) Rules, 1964 may be referred and which reads as under:-

> "4(1)……..
>
> (2)……
>
> (3) No Government servant shall in the discharge of his official duties deal with any matter or give or sanction any contract to any (company or firm) or any other person if any member of his family is employed in that (company or firm) or under that person or if he or any member of his family is interested in such matter or contract in any other manner and the Government servant shall refer every such matter or contract to his official superior and the matter or contract shall thereafter be disposed of according to the instructions of the authority to whom the reference is made."

Rules applicable to various categories of employees are always there is every establishments and it cannot be doubted that the respondents also have safeguards provided by service conduct rules and even otherwise by internal instructions and supervision, the officials of BSNL whose relatives offer bids could be kept away from decision making process. Since government and its departments and other instrumentality have

disciplinary control on the employees a check may be kept on the exercise of their duties if it relate to any dealing with the successful relative bidder, who may not be permitted to be able to gain advantage for himself. This way public interest would also not be permitted to be adversely affected and purity in public life would be maintained. There can be no gain saying that the existence of service conduct rules and norms to be observed by them is a fact very well known to the public at large and these rules advance the cause of maintenance of purity in public life as well.

This is also well settled as a result of the decision of the Apex Court in *Ramana Dayaram Shetty versus the International Airport Authority of India; 1979(3) S.C.C. 489,* that the state action must be in conformity with some standard or principle which needs the test of reasonableness and non-discrimination and any departure from such standard or principle would be invalid unless it can be supported or justified on some rational and non-discriminatory ground. Learned counsel for the respondents however with reference to his argument referred in the earlier part of the judgment placed reliance on the decision of the Apex Court in the case of *K.M. Kunhahammad etc. etc. versus State of Kerala and others; A.I.R. 1978 Supreme Court 771* and reiterated that the eclassification as laid down by the conditions in the bid document in question is founded on an intelligible differentia and which have direct nexus to the object sought to be achieved by the restrictions. When there are available safe-guards to the respondents by way of service conduct rules and disciplinary control over the employees the same serve the purpose and object of maintaining purity in public life. Therefore the classification as made in regard to the bidders by the conditions laid down cannot be said to be based on an intelligible differentia and it cannot also be said to be a reasonable classification. In other wards the cited decision does not help the cause of the respondents.

In view of the above discussion we are of the view that the impugned conditions at para 7 and 8 of section IV and 10 (II) of section VI of tender/bid document offend Article 14 of the Constitution of India and these being arbitrary, unreasonable and discriminatory to the petitioners are also violative of fundamental right guaranteed under Article 19 (1)(g) of the Constitution.

The petitioners have also prayed for issuance of writ in the nature of mandamus to the respondents for staying the confirmation of the contract already entered upon by them. Since no interim order staying the confirmation was granted in the petition we are not inclined to interfere in the matter of the contracts if already finalized in respect of some other successful bidders but we find it just and proper to allow the petition in regard to the other prayer claimed in the writ petition.

In the result the petition succeed and is allowed to the extent that the impugned conditions of the tender/bid document are hereby quashed and we issue a writ in the nature of mandamus directing the respondents to open the financial bids of the petitioners against remaining requirement, if any, of the vehicles and to take decision to award contract to the petitioners. No order as to costs.

Dated: 13-8-2003 (Irshad Hussain, J.) (M.M. Ghidiyal, J.)
ISB